

## The CommLaw Group

HELEIN & MARASHLIAN, LLC  
1420 Spring Hill Road  
Suite 205  
McLean, Virginia 22102

Writer's Direct Dial Number  
703-714-1301

Telephone: (703) 714-1300  
Facsimile: (703) 714-1330  
E-mail: [mail@CommLawGroup.com](mailto:mail@CommLawGroup.com)  
Website: [www.CommLawGroup.com](http://www.CommLawGroup.com)

Writer's E-mail Address  
[chh@commlawgroup.com](mailto:chh@commlawgroup.com)

June 7, 2010

FILED/ACCEPTED

JUN - 7 2010

Federal Communications Commission  
Office of the Secretary

### VIA HAND DELIVERY

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 - 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

06-122

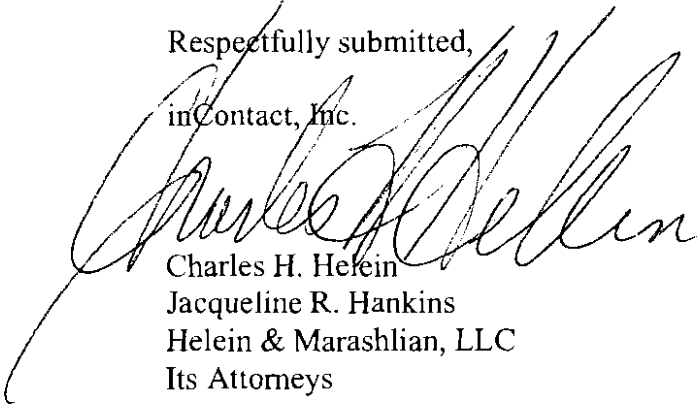
**Re: inContact, Inc.  
Form 499 Filer ID No. 818114  
Petition for Special Relief and Waiver**

Dear Secretary Dortch:

Enclosed please find an original and nine (9) copies of the Application for Review of the DA 10-779, May 7 decision ("Order") issued by the Federal Communications Commission's Wireline Competition Bureau.

An additional copy of this filing is also enclosed. Please date-stamp the copy and return in the postage-prepaid envelope provided. To the extent you have any questions concerning this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,  
inContact, Inc.

  
Charles H. Helein  
Jacqueline R. Hankins  
Helein & Marashlian, LLC  
Its Attorneys

Enclosures

Cc: Jennifer K. McKee  
Acting Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

## **TABLE OF CONTENTS**

<b>APPLICATION FOR REVIEW .....</b>	<b>1</b>
Executive Summary .....	1
Background .....	2
Application for Review – Questions Presented .....	4
Responses to Questions Presented .....	5
1. Whether the Bureau’s Order finding that inContact’s Petition was an “appeal from a USAC decision” is erroneous as a matter of law and contrary to fact? .....	5
Answer .....	5
2. Whether the Bureau’s Order finding that inContact’s Petition was untimely filed as an “appeal from a USAC decision” is erroneous as a matter of law and contrary to fact? .....	5
Answer .....	5
3. Whether the Bureau’s Order finding that USAC’s Invoice was a “decision” is erroneous as a matter of law and contrary to fact? .....	6
Answer .....	6
4. Whether the Bureau’s Order finding that USAC’s Invoice was a “decision” is in conflict with statute, regulation, case precedent or established Commission policy? .....	9
Answer .....	9
5. Whether the Bureau’s Order finding that USAC’s Invoice was a “decision” involves a question of law or policy which has not previously been resolved by the Commission? .....	9
Answer .....	9
6. Whether the Bureau’s Order finding that USAC’s Invoice was a “decision” is based on an erroneous finding as to an important or material question of fact? .....	9

Answer .....	9
7. Whether the Bureau’s Order finding that there is no rule regarding that an appeal on issues of billing and contributions be filed first with USAC (“ <i>USAC First Requirement</i> ”), ignoring USAC’s published policy requiring the appeals be first filed with it, involves application of a precedent or policy that should be overturned or revised? .....	10
Answer .....	10
8. Whether the Bureau’s Order finding that there is no <i>USAC First Requirement</i> disregards USAC’s published policy to the contrary and involves a question of law or policy which has not previously been resolved by the Commission; is based on an erroneous finding as to an important or material question of fact; or involves the application of a precedent or policy that should be overturned or revised? .....	11
Answer .....	11
9. Whether the USAC First Requirement is invalid as a matter of law? .....	11
Answer .....	11
10. Whether in consideration of the responses to the foregoing Questions Presented, the Bureau exceeded its authority? .....	12
Answer .....	12
11. Whether <i>de novo</i> review of the Bureau’s Order is required? .....	14
Answer .....	14
12. Whether inContact has been denied due process? .....	15
Answer .....	15
Conclusions .....	17

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	Application for Review of
Form 499 Filer ID No. 818114	)	Order of Wireline Competition Bureau
Petition for Special Relief and Waiver	)	DA 10-779, May 7, 2010
	)	

**APPLICATION FOR REVIEW**

Pursuant to 47 C.F.R. §1.115(a),(b)(2)(i),(ii) and (iv), inContact, Inc. d/b/a UCN (“inContact” or the “Company”) files this application for review (“Application”) of the May 7, 2010 decision (“Order”) issued by the Federal Communications Commission’s (“FCC” or “Commission”) Wireline Competition Bureau (“WCB” or “Bureau”).

**Executive Summary**

On April 13, 2009, inContact filed a Petition for Special Relief and Waiver (“Petition”) with the FCC seeking a declaration that the Universal Service Administrative Company’s (“USAC”) January 23, 2009 true-up invoice, assessing back Universal Service Fund (“USF”) fees, was untimely as a matter of law. The Bureau wrongfully denied inContact’s request, finding it untimely according to an FCC rule requiring petitioners to appeal USAC “decisions” within 60 days. USAC’s invoice does not qualify as a decision, and therefore, the 60-day deadline does not apply. As such, inContact’s request was timely submitted. The Bureau’s qualification of USAC’s invoice as a “decision” conflicts with FCC rules and thus exceeded the scope of its authority, warranting *de novo* review of the Order. Further, inContact properly sought waiver of the 60-day deadline, which the Bureau unlawfully ignored. Thus, the Bureau’s

Order dismissing inContact's request as an untimely appeal is erroneous as a matter of law.

Additionally, inContact sought waiver of USAC's requirement that a petitioner file a billing dispute with USAC before appealing to the FCC. The Bureau dismissed as "moot" inContact's request for waiver, finding that no such requirement exists. This contradicts USAC's published appeal policy. While USAC's policy undoubtedly is invalid, inContact cannot be penalized for taking a cautious approach and seeking waiver of a policy which the Commission's own USF administrator applies against contributors. The Bureau invented a procedural hurdle to avoid addressing the substance of inContact's Petition. As such, the Bureau violated FCC rules requiring a "hard look" at requests for waiver, and thereby exceeded the scope of its delegated authority. The interpretation of Commission rules and the validity of USAC policies both involve novel questions of mixed law and fact requiring *de novo* review of the Bureau's Order. The Commission must review *de novo* inContact's Petition, considering the substance of its requests, to preserve inContact's due process rights.

### **Background**

On January 23, 2009, USAC issued an invoice ("Invoice") to inContact, assessing Universal Service Fund ("USF") contribution fees pursuant to a true-up. On April 13, 2009, inContact filed a Petition for Special Relief and Waiver ("Petition") asking the Commission "to find USAC's January 2009 further true-up billing untimely, as a matter of law, and instruct USAC to remove such amounts from any future USAC invoice."<sup>1</sup> In its Conclusion, inContact stated its requests for relief as follows:

---

<sup>1</sup> inContact also asked the Commission to "declare unlawful any fees or contributions calculated based upon the retail interstate telecommunications revenue reported in Petitioner's 2004 Form 499-A." *In the Matter of Petition for Special Relief and Waiver by inContact, Inc. of a Decision*

The foregoing premises considered, the Commission is requested to grant this Petition and declare the January 23, 2009 claim of USAC barred as a matter of law under the Federal [Statute of Limitations]; to issue such further orders as deemed appropriate to provide official direction on the related issues raised by USAC's conduct as identified in this Petition; and to declare the issues of prior appeal to USAC, and of the pay first rule and the red-light rule moot and inapplicable.<sup>2</sup>

On May 6, 2009, the Commission placed inContact's Petition on Public Notice seeking comments and reply comments from interested parties.<sup>3</sup> On May 7, 2010, the Bureau denied the Petition on procedural grounds.<sup>4</sup> In particular, the WCB cited the FCC rule requiring a party seeking review of a USAC "decision" to file "within sixty (60) days of the issuance of the decision."<sup>5</sup> In its Order, the WCB stated:

Because the USAC decision was made on January 23, 2009, inContact was required to file a request for review by March 24, 2009. inContact, however, did not file its appeal until April 13, 2009, more than 20 days late.<sup>6</sup>

The Order rejected as "moot" inContact's request for "a waiver of the rules requiring contributors to first dispute USAC's assessments with USAC."<sup>7</sup> In doing so, the WCB ruled that

---

*of Universal Service Administrator*, Petition for Special Relief and Waiver, WC Docket No. 06-122 (Apr. 13, 2009) ("Petition") at 2.

<sup>2</sup> *Id.* at 17.

<sup>3</sup> In its Public Notice, the Commission described the relief inContact sought as follows: "InContact requests that the Commission find that USAC improperly issued the 2009 invoice, that the 'pay and dispute' and red-light policies should not be applied under [the] circumstances, and any resulting penalty, administrative fee or interest assessment should not be incurred." See *Public Notice, Comment Sought on InContact Petition for Special Relief and Waiver of Universal Service Fund Contributions*, WC Docket No. 06-122 (DA 09-1017) (Rel. May 6, 2010).

<sup>4</sup> See *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*, Order, WC Docket No. 06-122, DA 10-779 (Rel. May 7, 2010) ("WCB Order").

<sup>5</sup> WCB Order at ¶ 2.

<sup>6</sup> *Id.* (Emphasis added.)

<sup>7</sup> *Id.*

there is no requirement that a petitioner first file with USAC before appealing to the Commission.<sup>8</sup>

### **Application for Review – Questions Presented<sup>9</sup>**

This Application presents the following questions:

1. Whether the Bureau's Order finding that inContact's Petition was an "appeal from a USAC decision" is erroneous as a matter of law and contrary to fact?
2. Whether the Bureau's Order finding that inContact's Petition was untimely filed as an "appeal from a USAC decision" is erroneous as a matter of law and contrary to fact?
3. Whether the Bureau's Order finding that USAC's Invoice was a "decision" is erroneous as a matter of law and contrary to fact?
4. Whether the Bureau's Order finding that USAC's Invoice was a "decision" is in conflict with statute, regulation, case precedent or established Commission policy?
5. Whether the Bureau's Order finding that USAC's Invoice was a "decision" involves a question of law or policy which has not previously been resolved by the Commission?
6. Whether the Bureau's Order finding that USAC's Invoice was a "decision" is based on an erroneous finding as to an important or material question of fact?
7. Whether the Bureau's Order finding that there is no rule requiring that an appeal on issues of billing and contributions be filed first with USAC ("*USAC First Requirement*"), ignoring USAC's published policy requiring that appeals be first filed with it, involves application of a precedent or policy that should be overturned or revised?

---

<sup>8</sup> *Id.* at ¶3.

<sup>9</sup> This Application for Review is submitted in accordance with 47 CFR §1.115(b)(1) and (2). In particular: Rule 1.115(b)(1) (requiring statements of the questions presented for review with reference to appropriate findings of fact or conclusions of law); Rule 1.115(b)(2) (requiring specification of the factors which warrant Commission consideration of the questions presented); Rule 1.115(b)(2)(i) (requiring specification of how the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent or established Commission policy); Rule 1.115(b)(2)(ii) (requiring specification of how the action taken pursuant to delegated authority involves a question of law or policy which has not previously been resolved by the Commission); Rule 1.115(b)(2)(iii) (requiring specification of how the action taken pursuant to delegated authority involves application of a precedent or policy that should be overturned or revised); Rule 1.115(b)(2)(iv) (requiring specification of how the action taken pursuant to delegated authority is based on an erroneous finding as to an important or material question of fact).

8. Whether the Bureau's Order finding that there is no *USAC First Requirement* disregards USAC's published policy to the contrary and involves a question of law or policy which has not previously been resolved by the Commission; is based on an erroneous finding as to an important or material question of fact; or involves the application of a precedent or policy that should be overturned or revised?
9. Whether the *USAC First Requirement* is invalid as a matter of law?
10. Whether in consideration of the responses to the foregoing Questions Presented, the Bureau exceeded its authority?
11. Whether *de novo* review of the Bureau's Order is required?
12. Whether inContact has been denied due process?

### **Responses to Questions Presented**

1. **Whether the Bureau's Order finding that inContact's Petition was an "appeal from a USAC decision" is erroneous as a matter of law and contrary to fact?**

**Answer:** Yes. It is clear that inContact's Petition was not an appeal from a USAC decision. As stated in the Petition and as acknowledged by the Commission in its May 6, 2009 Public Notice, inContact sought special relief asking the Commission to make declarations of law and take specific actions to correct USAC's conduct in issuing the Invoice. Therefore, the Bureau's Order finding that inContact's Petition was an "appeal from a USAC decision" is erroneous as a matter of law and contrary to fact.

2. **Whether the Bureau's Order finding that inContact's Petition was untimely filed as an "appeal from a USAC decision" is erroneous as a matter of law and contrary to fact?**

**Answer:** Yes. Since inContact's Petition was not an appeal from a USAC "decision," the Bureau's Order dismissing it as an untimely appeal from a USAC decision is erroneous as a matter of law and contrary to fact.

**3. Whether the Bureau's Order finding that USAC's Invoice was a "decision" is erroneous as a matter of law and contrary to fact?**

**Answer:** Yes. The Order cites to FCC rules requiring petitioners file appeals of USAC "decisions" within 60 days.<sup>10</sup> While the FCC's rules do require petitioners to seek review of "an Administrator [USAC] decision within 60 days of issuance of the decision," no division, Committee or Board made a "decision."<sup>11</sup> The Petition did not request FCC review of a USAC decision. USAC's Invoice does not constitute a "decision."

Since the Commission's rules do not define the term "decision," the plain meaning of the term governs.<sup>12</sup> The plain meaning of the term "decision" is "a determination arrived at after consideration" or "a report of a conclusion."<sup>13</sup> It is clear that to be a decision, cognitive consideration of issues and circumstances must be involved. No statement of charges does so. USAC's Invoice therefore does not qualify as a "decision."<sup>14</sup>

---

<sup>10</sup> WCB Order at ¶ 2 (citing 47 C.F.R. §54.720(a)).

<sup>11</sup> The Commission's rules provide in 47 C.F.R. §54.720 that "An affected party requesting review of an Administrator decision by the Commission pursuant to § 54.719(c), shall file... within 60 days." Section 54.719(c) provides: "Any person aggrieved by an action taken by a division of the Administrator, as defined in § 54.701(g), a Committee of the Board of the Administrator, as defined in § 54.705, or the Board of Directors of the Administrator, as defined in § 54.703, may seek review from the Federal Communications Commission, as set forth in § 54.722." (Emphasis added.) In other words, the time limitation applies only to "decisions" taken by a division of USAC, one of its committees or its Board of Directors. None of these "decisional" entities issues invoices. *See, e.g.,* <http://www.usac.org/res/documents/fund-administration/pdf/USAC%20Invoice%20Description.pdf>.

<sup>12</sup> *See, e.g., Torres v. Chertoff*, 2007 WL 4261742 (N.D. Ga. 2007) at \*4 (distinguishing between the legal definition of decision and an "agency action" under the Administrative Procedure Act); *Verizon Wireless (VAW) LLC v. City of Rio Rancho, NM*, 476 F.Supp.2d 1325, 1336 (D.N.M. 2007) (distinguishing between a legal decision and a legislative one).

<sup>13</sup> *See* Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/decision>.

<sup>14</sup> *See, e.g., Bayview Hunters Point Cmty. Advocates v. Metro Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) ("A regulation should be construed to give effect to the natural and plain meaning of its words"); *See also El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539

In plain language, an invoice is “an itemized list of goods shipped [or services rendered] usually specifying the price and the terms of sale.”<sup>15</sup> In other words, an invoice is a bill, a mere list of payments due. By creating the Invoice, USAC did not issue a “decision” or otherwise make a conclusive determination regarding inContact’s USF liability. Instead, it simply applied a fixed percentage-based fee to reported revenues. Thus, an invoice does not and cannot qualify as a “decision” under the plain meaning of the term.

The term “decision” appears in the FCC rules, and therefore the “legal” definition of the term must also be considered in the context of those rules. When so considered, the legal definition of the term “decision,” requires the same conclusion, that an invoice is not a “decision.” Black’s Law Dictionary defines the term “decision” as “a judicial or agency, determination after consideration of the facts and the law.”<sup>16</sup> USAC’s Invoice involves no factual or legal determination. Nor does USAC’s Invoice contain any analysis or specification of issues or any underlying assertions. Instead, it only shows the results of the application of numerical percentages to reported revenues and lists the results of that application in dollar amounts allegedly owed.

USAC itself recognized that its Invoice merely billed (listed) a sum claimed to be due derived upon formulaic calculations. After it issued the Invoice to inContact, inContact contacted USAC to question the timing and the amount of the Invoice. USAC responded that

---

F.3d 1062, 1071 (9th Cir. 2008) (referring to the “bedrock principle” that courts “look to the plain meaning of [an agency’s] final rule as promulgated.”).

<sup>15</sup> See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/invoice>.

<sup>16</sup> Black’s Law Dictionary (8<sup>th</sup> ed. 2004); See also The Free Legal Dictionary at <http://legal-dictionary.thefreedictionary.com/decision> (defining “decision” as “a conclusion reached after an evaluation of facts and law.”); See also *Dickinson v. American Medical Response*, 186 P.3d 878, 884 (Nev. 2008) (concluding that an agency’s decision must include findings of fact and conclusions of law sufficient for the reviewing agency to adequately review the decision).

inContact need not pay the invoice on the due date identified, but rather could take a “couple of months” to review the “situation” and USAC’s Invoice.<sup>17</sup> Clearly, when issuing the Invoice, USAC did not consider it to be a “decision” on inContact’s liability for the payment of the amount invoiced but expressly allowed inContact to consider the Invoice before inContact made a final determination regarding its liability. And clearly, under these circumstances, only *after* inContact made its determination on the Invoice and so advised USAC could a “decision” by USAC be possible.

In sum, the Order’s holding defies both common sense and inContact’s fundamental rights. If an invoice qualified as a decision, it would improperly vest unilateral rights in the issuer to declare the rights of the parties. It would obligate the billed party to pay without question the amount determined by the issuer, thereby denying the billed party the fundamental right to dispute the accuracy of the invoice.<sup>18</sup> Likewise, this would deny inContact its fundamental due process rights.<sup>19</sup> USAC has no right or authority to cut off such rights, nor does the Bureau or the Commission itself. Because USAC’s Invoice does not qualify as a “decision,” USAC’s issuance of the Invoice never triggered the rules governing appeals, and the 60-day filing deadline did not apply.<sup>20</sup> As a result, the Bureau has acted outside the scope of its

---

<sup>17</sup> See Declaration of Kimm Partridge, attached hereto as Exhibit A.

<sup>18</sup> This is a right that even USAC recognized by allowing inContact to review the Invoice for a period of time as discussed below.

<sup>19</sup> Due process affords parties the opportunity to be heard and to present evidence against an opposing party. *Gray v. Netherland*, 518 U.S. 152, 181-82 (1996). (“Due process demands an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them....Due process requires a ‘full, fair, potentially effective opportunity’ to defend against charges levied.”) (internal cite omitted). Failing to afford inContact the opportunity to dispute the charges issued against it would deprive it of its due process rights.

<sup>20</sup> See discussion on waiver below.

delegated authority.<sup>21</sup> The Commission is therefore bound to act to enforce its own rules limiting the Bureau's delegated authority by itself acting on and deciding the issues raised in the Petition.<sup>22</sup>

**4. Whether the Bureau's Order finding that USAC's Invoice was a "decision" is in conflict with statute, regulation, case precedent or established Commission policy?**

**Answer:** Yes. The Bureau's erroneous dismissal of the Petition on the grounds that USAC's Invoice was a "decision" violates the Federal four-year default Statute of Limitations<sup>23</sup>, the Commission's regulations on rights of appeal from USAC decisions, and applicable precedents properly defining a "decision."

**5. Whether the Bureau's Order finding that USAC's Invoice was a "decision" involves a question of law or policy which has not previously been resolved by the Commission?**

**Answer:** Yes. The Bureau's Order clearly involves a question of law or policy which has not previously been resolved by the Commission. This alone sufficiently demonstrates that the Bureau acted outside the scope of its delegated authority and hence unlawfully.

**6. Whether the Bureau's Order finding that USAC's Invoice was a "decision" is based on an erroneous finding as to an important or material question of fact?**

**Answer:** Yes. While involving a mixed question of law and fact, it is clear that whether the Invoice qualifies as a decision involves an important and material fact. Since the Bureau found the "Invoice" to be a "decision" and consequently used that finding to block proper consideration of inContact's Petition, the Bureau's Order is based on an erroneous finding as to not only an important and material question of fact, but of a critical fact.

---

<sup>21</sup> 47 C.F.R. §0.91.

<sup>22</sup> *Id.*

<sup>23</sup> 28 U.S.C. § 1658(a).

**7. Whether the Bureau's Order finding that there is no rule requiring that an appeal on issues of billing and contributions be filed first with USAC ("*USAC First Requirement*"), ignoring USAC's published policy requiring that appeals be first filed with it, involves application of a precedent or policy that should be overturned or revised?**

**Answer:** Yes. The WCB improperly dismissed inContact's request for waiver of the *USAC First Requirement*. In doing so, the Bureau simply ignored USAC's published policy that purports to require: "[F]or disputes regarding contributions or billing and collection issues *you must write first to USAC* so that it has an opportunity to resolve your appeal and grant it, if appropriate."<sup>24</sup> While the language used by USAC is unfortunate, it is clear that: (1) USAC required disputes to first be filed with it; (2) USAC calls the written dispute an "appeal"; (3) USAC's purpose is to resolve the dispute, that is, to *make a decision*. This establishes, beyond a doubt, that the Invoice is the cause of the dispute over which USAC must make a decision that would only *then* be appealable to the Commission. inContact sought to avoid the circuitous route mandated by USAC by filing its waiver. However, inContact is being penalized for taking USAC's published requirements for their intended purpose, relying upon USAC's published dispute policy on its website,<sup>25</sup> and in respect thereof, seeking a waiver to ensure review of its Petition by the proper authority.

Ironically, the Bureau's determination that there is no *USAC First Requirement* further confuses and complicates the issue. Nowhere has the Commission granted the Bureau the delegated authority to override or declare USAC's pronouncement about its administration of its duties of no consequence. The Commission has not authorized the Bureau to unilaterally make

---

<sup>24</sup> See <http://www.universalservice.org/fund-administration/contributors/file-appeal/> (Emphasis added.)

<sup>25</sup> Furthermore, USAC cannot interpret FCC rules. 47 C.F.R. § 54.702. Therefore, its appeal policy cannot amount to an interpretation of FCC rules, but instead constitutes the Administrator's own policy with which contributors have been required to comply.

such pronouncements inoperative in order to justify its action dismissing the waiver as moot. In so doing, the Bureau has created a conflict of authority with regard to the public's rights and obligations. As a result, by ignoring USAC's published *USAC First Requirement*, the Bureau has acted beyond the scope of its delegated authority and made it impossible to achieve compliance with Commission regulations.

- 8. Whether the Bureau's Order finding that there is no *USAC First Requirement* disregards USAC's published policy to the contrary and involves a question of law or policy which has not previously been resolved by the Commission; is based on an erroneous finding as to an important or material question of fact; or involves the application of a precedent or policy that should be overturned or revised?**

**Answer:** Yes. As shown above, the Bureau's finding that there is no *USAC First Requirement* in disregard of USAC's published policy to the contrary involves a question of law or policy. Moreover, this question has not been previously resolved by the Commission, is based on the Bureau's erroneous finding as to an important material question of fact, and involves the application of a policy that must be overturned.

- 9. Whether the *USAC First Requirement* is invalid as a matter of law?**

**Answer:** Yes. There is no evidence that the Commission ever conducted the necessary procedures to authorize USAC to publish or enforce a rule requiring that appeals on billing and contributions be filed first with USAC instead of the Commission. USAC therefore has no authority to publish or enforce this rule.<sup>26</sup> The Bureau's Order disregarding this requirement only adds to the public's confusion, rendering compliance efforts impossible. The Commission

---

<sup>26</sup> It is recognized that this position, if upheld, moots inContact's request for waiver of the *USAC First Requirement*. However, the issue was not moot when inContact filed its Petition and it could not at that time be foreseen that the Bureau would declare the *USAC First Requirement* inoperative. And, inContact had the discretion to choose the legal strategy it wished to pursue when it filed its Petition – that of seeking a waiver of a published requirement rather than seeking to have the requirement declared *ultra vires*.

must find that the *USAC First Requirement* is invalid as a matter of law, and conduct proper procedures to establish clear and unequivocal appeal policies that the public can follow.

**10. Whether in consideration of the responses to the foregoing Questions Presented, the Bureau exceeded its authority?**

**Answer:** Yes. The Bureau exceeded the scope of its authority when it held that a USAC invoice constitutes a decision under FCC rules. While the FCC has authority to delegate certain responsibilities to the WCB,<sup>27</sup> those responsibilities cannot be exercised in contravention of Commission rules, policies and orders.<sup>28</sup> Neither the common nor legal definition of “decision” extends to a simple “invoice.” And, even more importantly, the Commission has not adopted a substantive rule establishing invoices as decisions.

Turning “invoices” into “decisions” requires a rule, a rule that would have a substantive effect on USF contributors as it (as in this case) affects their appeal rights.<sup>29</sup> And, as a substantive rule, to be valid, it must first have been adopted pursuant to the notice and comment requirements of the Administrative Procedure Act (“APA”).<sup>30</sup> No notice and comment proceeding was initiated or exists to turn a USAC “invoice” into a USAC “decision.” Hence, the Commission itself cannot adopt the Bureau’s boot-strap reasoning. Moreover, the Bureau itself has no authority to initiate rulemakings and therefore has no legitimate means by which to turn

---

<sup>27</sup> 47 U.S.C. §155; 47 C.F.R. §0.91.

<sup>28</sup> As an entity with delegated authority, the WCB must abide by the rules of its governing agency, the FCC.

<sup>29</sup> That is, the policy would have substantive effect because it implements, interprets and prescribes FCC policy. See 5 U.S.C. §§551(4), 552(a)(1)(D); *GMC v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (“An interpretative rule simply states what the administrative agency thinks the statute means, and only ‘reminds’ affected parties of existing duties’. On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.”) (internal citations omitted).

<sup>30</sup> 5 U.S.C. §553(b).

USAC “invoices” into USAC “decisions.”<sup>31</sup> Because the Commission has not previously adopted a rule defining a USAC invoice as a USAC decision, the Bureau acted on a novel question of law and fact that is outside the scope of its authority.<sup>32</sup> The Bureau is not entitled to review “any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.”<sup>33</sup>

Furthermore, the Bureau exceeded its authority when it failed to consider inContact’s request for waiver. As discussed, inContact sought waiver of the requirement that it first seek review with USAC before filing an appeal with the Commission.<sup>34</sup> The Bureau’s Order however creates a decision in order to use the 60-day deadline as a means of dismissing inContact’s Petition as untimely filed.

The Bureau summarily denied the request without considering its merits. This violates the Commission’s rules, and thereby the Bureau’s powers. The Commission’s rules authorize the Bureau to “act on requests for...waiver of rules.”<sup>35</sup> Implicit in the requirement to “act on” waiver requests is the obligation to abide by the requirement to give serious consideration to waiver requests.<sup>36</sup> Under the Commission’s “hard look” policy, the FCC and its agents must

---

<sup>31</sup> 47 C.F.R. §0.291(e).

<sup>32</sup> 47 C.F.R. §0.291(2).

<sup>33</sup> *Id.*

<sup>34</sup> inContact cited to the 60-day filing rule and proceeded to request review thereof. Petition at 16.

<sup>35</sup> 47 C.F.R. §0.91(b).

<sup>36</sup> See, e.g., Letter from Scott Powell, Federal Communications Commission to Birch Broadcasting Corporation, 24 FCC Rcd. 8945, 9049 (2009) (“[T]he Commission must consider carefully all waiver requests.”); *In the Matter of Rupert K. Murdoch and the Fox Entertainment Group*, Applications for Transfer of Control of Fox Television Stations, Inc., Memorandum Opinion and Order on Reconsideration, 24 FCC Rcd. 5824, 5828 (2006) (“[T]he Commission is obligated to take a ‘hard look’ at waiver requests to determine whether the application of a rule in a particular circumstance would disserve the public interest.”); *In the Matter of Application for Review of the Denial of Vista Communications, Inc.’s Request for Waiver of the Installment*

“take a ‘hard look’ at meritorious applications for waiver...and must consider all relevant factors.”<sup>37</sup>

Established precedents require that the Commission give serious consideration to requests for waiver of FCC rules. The Bureau violated this rule by holding that there is no *USAC First Requirement*, allowing it to dismiss the request for waiver of that policy as “moot,” but ignoring in its entirety inContact’s waiver request, which includes the 60-day filing deadline, since no decision would be sought from USAC under the *USAC First Requirement*. By simply ignoring the existence of the *USAC First Requirement*, the Bureau circumvented its obligation to address whether inContact demonstrated good cause for waiver of the 60-day deadline. The Bureau’s procedural legerdemain allowed it to ignore completely the arguments put forth by inContact, and thereby failed to meet the stringent “hard look” standard that applies to waiver requests. In so doing, the Bureau once again exceeded the scope of its delegated authority.

#### **11. Whether *de novo* review of the Bureau’s Order is required?**

**Answer:** Yes. *De novo* review of the WCB’s Order is required. The Commission’s rules state that the FCC:

shall conduct *de novo* review of requests for review of decisions by the Administrator that involve novel questions of fact, law, or policy; provided, however, that the Commission shall not conduct *de novo* review of decisions issued by the Wireline

---

*Payment Rules for the 218-219 MHz Service*, Memorandum Opinion and Order, 18 FCC Rcd. 16957, n. 50 (2003) (citing *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (“[G]overnment agencies must give waiver requests a ‘hard look’ and not a perfunctory denial.”); *In re Instapage Network, Ltd.*, Order on Reconsideration, 17 F.C.C.R. 19083, 19094 (2002) (“Under the ‘hard look’ standard, an agency is required ‘to articulate with clarity and precision its findings and the reasons for its decisions.’”) (internal citations omitted); *In re BDPCS, Inc.*, Memorandum Opinion and Order, 15 F.C.C.R. 17590, n. 23 (2000) (“Under the ‘hard look doctrine’ a Court will sustain agency action when it is apparent that the agency took a ‘hard look’ at a party’s contentions.”).

<sup>37</sup> *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-92 (D.C. Cir. 1983).

Competition Bureau under delegated authority.”<sup>38</sup>

The limitation on *de novo* review is not applicable to the WCB Order because the Order is invalid and beyond the scope of the Bureau’s delegated authority. Because the WCB’s decision does not fall within the WCB’s delegated authority, the Commission must review that Order *de novo*. *De novo* review is required when mixed questions of law and fact arise as they clearly do here.<sup>39</sup> *De novo* review is further required when novel questions of fact, law, or policy are presented as they clearly are here.<sup>40</sup> The Commission must review *de novo* inContact’s request for waiver and consider the substance of inContact’s Petition to ensure inContact is afforded due process.

**12. Whether inContact has been denied due process?**

**Answer:** Yes. First, the Bureau has denied inContact due process because it has unilaterally defined USAC’s Invoice as a “decision” triggering time limitations for appeal. This has deprived inContact of the fundamental right to dispute the accuracy of the Invoice, and thus, its fundamental right to present evidence to dispute the charges.<sup>41</sup> USAC has no right or authority to cut off such rights, nor does the Bureau or the Commission itself.

Second, the Bureau’s decision has exceeded the scope of its authority and deprived inContact of the opportunity to present its case to the full Commission. Pursuant to 47 C.F.R. §1.115, if the Commission grants this Application for Review, it may:

Simultaneously reverse or modify the order from which review is sought; (ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, [or]... (iii) Order such other proceedings, including briefs and oral argument, as may be

---

<sup>38</sup> 47 C.F.R. §54.723. (Emphasis added.)

<sup>39</sup> See, e.g., *Parker v. Sec’y for the Dep’t of Corrs.*, 331 F.3d 764, 765 (11th Cir. 2003).

<sup>40</sup> See 47 C.F.R. §0.291.

<sup>41</sup> This is a right that even USAC recognized by allowing inContact to review the Invoice for a period of time as discussed below.

necessary or appropriate.<sup>42</sup>

The Commission should go beyond mere reversal of the order and remand to the Bureau for reconsideration. Instead, the FCC should consider the merits of the Petition to preserve inContact's due process rights. Due process affords parties the opportunity to be heard and to present evidence against an opposing party.<sup>43</sup> It requires the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>44</sup> Failing to afford inContact the opportunity to dispute the charges issued against it would deprive it of its due process rights.

In other words, ignoring the merits of the Petition would deny inContact its due process rights. Specifically, failure to consider the arguments raised would deprive inContact of a meaningful opportunity to present its case to the agency with the proper authority to consider its request, the FCC. Further, failure to do so would only delay resolution of this matter and vindication of inContact's rights. That is, by remanding the Petition to the Bureau for reconsideration, inContact would be forced to await a delayed resolution of its case. If instead the Commission considers the merits of the action in conjunction with its ruling on this Application, inContact would experience immediate relief.

This result is further supported by public interest concerns. inContact is not the only petitioner that has likely experienced inequitable treatment by USAC or the application of the *USAC First Requirement*. Commission review of the underlying legal injustices arising from this policy is required to ensure that parties understand and have the opportunity to avail themselves of their appeal rights.

---

<sup>42</sup> 47 C.F.R. §1.115(h)(1).

<sup>43</sup> *Gray v. Netherland*, 518 U.S. 152, 181-82 (1996).

<sup>44</sup> *Id.*

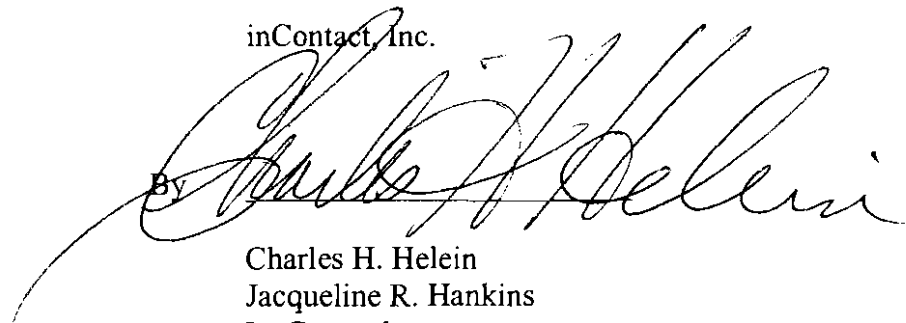
## Conclusions

Because mixed and novel questions of law and fact are involved, *de novo* review of the Bureau's Order is required. The Commission must review *de novo* (1) whether USAC's rendering of an invoice is a final "decision" that activates and is subject to the rules for appeals of decisions by one of the enumerated authorities specified in the rules, (i.e., a division of the Administrator, a Committee of the Board of Directors, or the Board);<sup>45</sup> (2) whether the Invoice constitutes a "decision"; (3) whether the *USAC First Requirement* is invalid because there is no public record that the Commission authorized USAC to make this a requirement; (4) whether the Bureau's delegated authority includes declaring the *USAC First Requirement* non-existent; and (5) whether the Bureau's dismissal of inContact's waiver violates the standards for consideration of waivers.

The Commission must review the Bureau's Order *de novo* and find it invalid and of no effect. The Commission must then take up and consider the merits of inContact's Petition. inContact therefore respectfully requests that the FCC grant this Application for Review of the Bureau's Order and act on its April 13, 2009 Petition for Special Relief and Waiver and decide the issues therein presented.

Respectfully submitted,

inContact, Inc.

By   
Charles H. Helein  
Jacqueline R. Hankins  
Its Counsel

---

<sup>45</sup> It is noted that Subpart I is entitled "Review of Decisions Issued by the Administrator."

Helein & Marashlian, LLC  
1420 Spring Hill Road  
Suite 205  
McLean, VA 22102

# EXHIBIT .

A

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	Application for Review of
Form 499 Filer ID No. 818114	)	Order of Wireline Competition Bureau
Petition for Special Relief and Waiver	)	DA 10-779, May 7, 2010
	)	

Declaration of Kimm Partridge

I, Kimm Partridge, am the Corporate Secretary of inContact, Inc. d/b/a UCN ("inContact" or "the Company").

1. This declaration is based on the best of my knowledge, information and belief and subject to the penalties of perjury.
2. This declaration is provided in support of inContact's Petition for Reconsideration, filed herewith.
3. I make this declaration based on the knowledge and experience I have gained as inContact's Corporate Secretary.
4. In my role as Corporate Secretary, I oversee the Company's regulatory obligations, including its Universal Service Fund ("USF") liabilities.
5. I regularly review invoices received from federal regulatory agencies and their administrators including the Universal Service Administrative Company ("USAC").
6. I received and reviewed an invoice from USAC dated January 23, 2009 ("the Invoice").
7. After reviewing the Invoice, I contacted USAC seeking an explanation of the timing and items invoiced.
8. We asked for permission from USAC to have time to review the invoice.
9. We were informed by a representative of USAC that inContact could take some time to consider the invoice before paying.

10. I have read the attached Petition for Review, and the facts stated therein are true to the best of my knowledge, information and belief.

KE Partridge  
Signature

Kimm Partridge  
Printed Name  
Corporate Secretary  
Title

6-4-10  
Date